

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE WEAKS,

Defendant-Appellant.

UNPUBLISHED

August 19, 2003

No. 237798

Wayne Circuit Court

LC No. 00-014046

Before: Donofrio, P.J., and Bandstra and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was acquitted of two counts of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, but convicted of being a felon in possession of a firearm, MCL 750.224f. He was sentenced as a second habitual offender, MCL 769.12, to six to twenty years’ imprisonment. He appeals as of right. We affirm.

Defendant was charged with fatally shooting two men at a drug house. The prosecutor alleged that defendant was upset with the price he had received when he sold the men a gun. The defense theory was that others killed the two victims when drug sale money was discovered missing. In a custodial statement to the police, defendant stated that he used a .25 caliber pistol to shoot the two victims in self-defense. The defense attacked the reliability of the confession because the physical evidence indicated that the victims were shot with *two* larger-caliber weapons, .38 caliber and 9 mm. Defendant suggested that a group of men who looted the house after the shooting should have been investigated because many of them admitted that they had guns matching the calibers of the murder weapons. The jury acquitted defendant of the two murder counts and the related felony-firearm charge, but found him guilty of being a felon in possession of a firearm.

I. The Prosecutor’s Arguments

Defendant first argues that the prosecutor committed misconduct by arguing several times that the defense had used “smoke and mirrors,” by asserting that the prosecution had presented “good” truthful witnesses, and by calling defendant a “spin doctor.”

This Court generally reviews claims of prosecutorial misconduct case by case and reviews the record as a whole to determine whether the defendant was denied a fair trial. *People*

v Bahoda, 448 Mich 261, 267; 531 NW2d 659 (1995). Because defendant did not object to the prosecutor's arguments, however, reversal is required only if a plain error affected defendant's substantial rights and if defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (unpreserved claims of constitutional error); *People v Grant*, 445 Mich 535, 552-554; 520 NW2d 123 (1994) (unpreserved claims of nonconstitutional error); *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (unpreserved claims of federal constitutional error); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000) (applying the plain error standard to unpreserved claims of prosecutorial misconduct).

The prosecutor's references to "smoke and mirrors," or to defendant being a "spin doctor," were not plain error. Rather, they were colorful ways of commenting on the evidence. *People v Rodriguez*, 251 Mich App 10, 40; 650 NW2d 96 (2002) (prosecutor's argument in closing that the defense used "smoke and mirrors" was not misconduct). The reference to a prosecution witness as a "good" witness was a proper comment upon the nature and credibility of his testimony. Contrary to defendant's argument, the prosecutor did not improperly vouch for the witness when he argued that the witness was telling the truth, because the prosecutor never implied that he had special knowledge about the witness' veracity. *Bahoda*, *supra* at 276; *Rodriguez*, *supra* at 31.

II. Failure to Tape Record Defendant's Custodial Statement

Defendant next argues that the due process clause of the Michigan Constitution, Const 1963, art 1, § 17, was violated because the police failed to tape record his custodial interrogation, in which defendant admitted possessing and disposing of a firearm. There is no authority requiring the police to record interrogations even when they have equipment readily available. *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998). The movement in some jurisdictions to require or recommend recording through statutory enactments or interpretation of those states' constitutions is well documented in defendant's brief on appeal. Nonetheless, the Michigan Constitution imposes no such obligation. *Id.*

III. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to establish that an offense took place on the date charged in the information, namely, November 13, 2000. Defendant argues that no witnesses testified to seeing him possess a firearm on that specific date, and that his own custodial statement was insufficient to establish the date because the jury "obviously" rejected the statement when it acquitted him of the other charges.

Defendant's custodial statement, viewed most favorably to the prosecution, is sufficient to establish the date of the offense. *Carines*, *supra* at 757. In his statement, defendant stated that he used a .25 caliber firearm on November 13, 2000, to shoot the two men. While the jury appears to have disbelieved portions of the statement (notably his admission that he killed the two victims), this does not mean that the jury necessarily found the entire statement to be false.

The jury was entitled to consider the weight and credibility of the statement, and to accept parts and reject others. See *Knowles v The People*, 15 Mich 408, 412 (1867); CJI2d 3.6(5).¹

IV. Cumulative Effect of Error

Finally, defendant argues that the cumulative effect of the errors discussed above denied him a fair trial. See *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Because there are no individual errors, there is no cumulative effect. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

¹ The jury was so instructed.